No. 06-

IN THE

Supreme Court of the United States

NDS GROUP PLC; NDS AMERICAS, INC.,
Petitioners,

v.

SOGECABLE, S.A.; CANALSATÉLITE DIGITAL, S.L.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

EUGENIE C. GAVENCHAK
Deputy General Counsel
News Corporation
1211 Avenue of the Americas
New York, New York 10036

DARIN W. SNYDER
(Counsel of Record)
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071
(213) 430-6000

MARK S. DAVIES
DAVID J. L. MORTLOCK
SUSAN M. MOSS
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006

Attorneys for Petitioners

QUESTIONS PRESENTED

1. The Racketeer Influenced and Corrupt Organizations Act ("RICO") makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). RICO defines an "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

The RICO questions presented are:

(a) Whether an "enterprise" may consist solely of a corporate defendant (the "person") and its subsidiaries or agents.

(b) Whether an "enterprise" comprising a "group of individuals associated in fact" must have a structure separate from the "pattern of racketeering activity."

2. Whether the Ninth Circuit should be summarily reversed for holding, contrary to *United States v. Kubrick*, 444 U.S. 111 (1979), that statutes of limitations do not begin to run until an injured person discovers the identity of the defendant.

PARTIES TO THE PROCEEDING

Petitioners are NDS Group PLC and NDS Americas, Inc., defendants-appellees below.

Respondents are Sogecable, S.A. and CanalSatélite Digital, S.L., plaintiffs-appellants below.

CORPORATE DISCLOSURE STATEMENT

Petitioner NDS Americas is a wholly-owned subsidiary of petitioner NDS Group PLC.

Petitioner NDS Group PLC is a publicly traded company. News Corporation is a publicly traded company that owns more than 10% of NDS Group PLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners NDS Group PLC and NDS Americas, Inc. (collectively "NDS") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the court of appeals is unreported but is available at 2006 WL 3698713 and is reprinted in the Appendix to the Petition ("App.") at 1a-5a. The district court's order granting NDS's motion to dismiss the Second Amended Complaint is unreported and is reprinted at App. 6a-29a. The district court's order granting NDS's motion to dismiss the First Amended Complaint is unreported and is reprinted at App. 30a-38a.

JURISDICTION

The court of appeals issued its decision on December 13, 2006. App. 1a. An order denying petitioners' petition for rehearing and rehearing en banc was entered on February 21, 2007. App. 39a. On May 8, 2007, Justice Kennedy granted an extension of time to file a petition for a writ of certiorari to June 11, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section (c) of 18 U.S.C. § 1962, Prohibited activities, provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of

> racketeering activity or collection of unlawful debt.

Section (3) of 18 U.S.C. § 1961, Definitions, provides:

> "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

Section (4) of 18 U.S.C. § 1961 provides:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

STATEMENT OF THE CASE

This case presents two related questions about the construction and scope of "enterprise" as used in the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. Plenary review of those questions is warranted, for the reasons elaborated below. But the case also presents a distinct question as to the proper trigger for the limitations period under the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1201 *et seq.*, the Federal Communications Act ("FCA"), 47 U.S.C. § 151 *et seq.*, and state tort laws. On that question, the decision below is so unambiguously contrary to this Court's controlling precedent that summary reversal is in order.

The two RICO issues arise from the statute's central liability provision, which makes it unlawful for a "person" to be "associated" with an "enterprise" engaged in a "pattern of racketeering activity." 18 U.S.C. § 1962(c). Plaintiffs allege that NDS Group is a "person" that has violated RICO by "associat[ing]" with a technology "enterprise" consisting of NDS Group, its wholly-owned subsidiary NDS Americas, and certain agents. Plaintiffs also allege that the technology enterprise engaged in a "pattern of racketeering activity."

The district court ruled that plaintiffs failed to allege a RICO "enterprise" because (1) the technology enterprise was "nothing more than a subset" of NDS Group, the alleged RICO person and (2) the technology enterprise, an alleged association in fact, did not have a "structure" separate from the alleged pattern of racketeering activity. The Ninth Circuit reversed, ruling that plaintiffs' allegations satisfy the statutory requirements for a RICO enterprise. The court's ruling implicates two deep splits among the courts of appeals over the meaning of RICO's enterprise requirement.

First, the circuits are divided 3 to 4 to 4 on whether or when a RICO enterprise can include only the RICO person (*i.e.*, the corporate defendant) and its subsidiaries or agents. In *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164 (2001), the Court noted but did not resolve this question. And, in *Mohawk Industries, Inc. v. Williams*, 546 U.S. 1075 (2005), the Court granted certiorari on this question, held argument, but ultimately dismissed the grant as improvidently granted. *Mohawk Industries, Inc. v. Williams*, 126 S. Ct. 2016 (2006).[1] Today, three circuits — the Sixth, Ninth, and Eleventh — hold that a RICO person and its subsidiaries or agents always constitute an "enterprise" distinct from the RICO "person." Four circuits — the First, Second, Eighth, and Tenth — hold that a RICO person and its subsidiaries or agents can "sometimes" constitute an enterprise. And four

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[1] In *Mohawk*, the writ of certiorari presented two questions: (1) Whether a defendant corporation and its agents can constitute an "enterprise" under RICO and (2) Whether allegations that the hourly wages plaintiffs accepted were too low to state proximately caused injuries to business or property under RICO. This Court granted certiorari limited to the first question, the question presented here. After argument, the Court dismissed the limited writ as improvidently granted, and then granted the petition, vacated the lower court's judgment, and remanded the case for consideration in light of *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006) (holding that RICO civil plaintiffs must plead an injury directly caused by the RICO predicate acts). 126 S. Ct. 2016 (June 5, 2006).

circuits — the Third, Fourth, Fifth, and Seventh — properly hold that a RICO person and its subsidiaries or agents can never constitute an enterprise. This Court's guidance remains sorely needed.

Second, the courts of appeals are split 5 to 4 on whether a RICO enterprise must have a "structure" that is separate from the alleged pattern of racketeering activity. In *Odom v. Microsoft Corp.*, the Ninth Circuit recently stated that this Court's decision in *United States v. Turkette*, 452 U.S. 576 (1981), has caused "confusion" in the Circuits. No. 04-35468, 2007 WL 1297249, at *8 (9th Cir. May 4, 2007) (en banc). Five circuits — the Third, Fourth, Seventh, Eighth, and Tenth — "have read the language in *Turkette* to require that an associated-in-fact enterprise have some kind of ascertainable separate structure." *Id.* Four other circuits — the First, Sixth, Ninth, and Eleventh — "have rejected any requirement that there be an 'ascertainable structure, separate or otherwise, for an associated-in-fact enterprise.'" *Id.*

Although the decision below adopts two expansive and incorrect views of RICO's "enterprise" requirement, those views at least draw support from decisions by other courts of appeals. But the panel's statute of limitations ruling is literally unprecedented. The court of appeals held that the statutory limitations period begins only when the *identity of the alleged injurer* is discovered, rather than when the injury is discovered. App. 2a-3a. This ruling is contrary to *United States v. Kubrick*, 444 U.S. 111 (1979), a decision expressly rejecting the argument that lack of knowledge of the identity of the injurer prevents the start of the statute of limitations period. Summary reversal is appropriate.

A. Legal Background

The principle RICO provision at issue, 18 U.S.C. § 1962(c), provides: "It shall be unlawful for any person employed by or associated with an enterprise engaged in, or the activities of which affect, interstate or foreign commerce,

to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." Under 18 U.S.C. § 1964(c), any person injured in business or property by reason of a violation of § 1962 may recover treble damages and attorney's fees.

The text provides that only the "person" is liable; the "enterprise" itself is not liable. "[E]nterprise" is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

The DMCA and the FCA both import the three-year statute of limitations set out in the Copyright Act. 17 U.S.C. § 507(b). The relevant state statute of limitations is two years. *See Knoell v. Petrovich*, 76 Cal. App. 4th 164, 168 (1999).

B. Factual Background

This matter involves "conditional access technology" for satellite transmissions of movies, television programming, and other media content. Satellite transmissions of media content are necessarily broadcast over large geographic areas that include both subscribers who pay to view the content and potential viewers who have not subscribed. Accordingly, satellite media companies "encrypt" the transmissions so that the programming is not readily viewable. If an individual pays for the programming, the viewer is provided with conditional access technology that unlocks the encryption and permits the subscriber to view the media content.

Petitioners NDS Group PLC and its wholly-owned subsidiary NDS Americas, Inc. (collectively "NDS") are the leading global suppliers of conditional access systems. NDS conditional access software and interactive systems for television systems use "smart cards," plastic credit card-sized devices that contain sophisticated computer chips. To assure that NDS technology remains secure, NDS engages in an

aggressive anti-piracy program and routinely submits its own technology and the technology of its competitors to scrutiny for possible security gaps. At the time of the alleged acts, petitioner NDS Group had offices around the world, including a research and development facility in Haifa, Israel. Petitioner NDS Americas performs sales, customer support, marketing, and smart card processing for its parent NDS Group.

Respondents Sogecable, S.A. and its subsidiary, Canal-Satélite Digital, S.L. (collectively "Sogecable"), provide pay satellite television service in Spain. At the time of the events at issue, Sogecable used a conditional access technology supplied by the one of its affiliates, Canal+ Technologies ("Canal+"). Canal+'s "MediaGuard" brand conditional access system also used smart cards that subscribers placed in their television set-top boxes. Each smart card included a read-only memory file ("UserROM") containing code that is part of the system used to unlock Sogecable's programming transmissions.

In March 1999, the Canal+ UserROM was published on the Internet. App. 13a. After the code was published, counterfeit Canal+ smartcards began appearing worldwide. App. 17a. In March 2002, Canal+ sued NDS for allegedly enabling counterfeit Canal+ smart cards. *Groupe Canal+ S.A. et al v. NDS Group PLC et al.*, No. 02-cv-01178 (N.D. Cal. filed Mar. 11, 2002). App. 35a. The Canal+ litigation settled pursuant to an agreement between the parent companies of Canal+ and NDS.

C. Prior Proceedings

1. In July 2003, more than three years after learning that the Canal+ code was posted to the Internet, Sogecable filed this lawsuit. App. 21a. Sogecable's complaint alleges that NDS Group is responsible for the publication of the Canal+ UserROM. App. 7a. (Due to the procedural posture of this case, we assume the accuracy of the facts as alleged by plain-

tiffs, though in fact these allegations are baseless.) In particular, Sogecable alleges that NDS researchers in Israel (the "Haifa Team") extracted the Canal+ UserROM. App. 12a. Among others, NDS hired Oliver Kommerling to help extract the UserROM. Pl. 2d Am Compl. ¶¶ 76, 79, 80. Sogecable further alleges that NDS Group then transmitted this code to an NDS Americas employee, Christopher Tarnovsky. App. 7a. Tarnovsky allegedly transmitted the code to the operator of a Canadian website, and the code was posted on the site. *Id.* Counterfeit smart cards were allegedly manufactured as a result of this posting, allowing Sogecable's customers' access to premium satellite programming while only paying for basic access. *Id.*

Sogecable asserts that these allegations state a RICO claim under Section 1962(c). Sogecable alleges that NDS Group, the RICO "person," formed an "enterprise" and committed a "pattern of racketeering activity" including copyright infringement, misconduct in connection with access devices, and mail and wire fraud. Pl. 2d Am Compl. ¶ 171. In particular, Sogecable alleged a "technology enterprise" purportedly including "the association of NDS Group, the Haifa Team (including Tarnovsky and Kommerling), and NDS Americas." *Id.* ¶ 165.[2]

In addition to RICO, Sogecable alleged violations of the DMCA, the FCA, and asserted state law claims for intentional interference with contract and tortious interference with prospective economic advantage.

2. The district court dismissed the entire complaint. *Sogecable S.A. v. NDS Group PLC*, No. 8:03-cv-01174-DOC-AN (C.D. Cal. Aug. 3, 2004). App. 6a-29a. The court ruled that Sogecable had not adequately pled the existence of a RICO enterprise. App. 25a-28a. The court also ruled that

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[2] Sogecable also alleged a "distribution enterprise," but the allegations there do not implicate the questions presented by this petition.

Sogecable's other claims are barred by the applicable statutes of limitations. App. 8a-24a.

According to the district court, the enterprise allegations are inadequate for two reasons. First, the alleged technology enterprise could not "associate" with the RICO person because it *was* the RICO person. App. 27a-28a. NDS Group is the only defendant named in the RICO count as a RICO "person." App. 28a. The court found that an enterprise comprising NDS Group and its employees and subsidiary is just "NDS Group or a piece of NDS Group." App. 28a. Because the "defendant/person is also NDS Group," the alleged technology enterprise is not distinct enough from the RICO person to "associate" with the person, as the RICO statute requires. *Id.*

The district court also dismissed the RICO claim because the alleged "enterprise" did not have a separate "structure." App. 28a. After citing *Turkette*, the district court noted that the "law of the Ninth Circuit further requires that the 'organization, formal or informal, be an entity separate and apart from the pattern of racketeering activity in which it engages.'" App. 24a (quoting *Chang v. Chen*, 80 F.3d 1293, 1298 (9th Cir. 1996), *overruled in pertinent part by Odom v. Microsoft Corp.*, No. 04-35468, 2007 WL 1297249 (9th Cir. May 4, 2007)). Applying the Ninth Circuit's decision in *Chang*, the court dismissed the complaint because "the important fact remains that the only *structure* that the Technology Enterprise is alleged to have is that of NDS Group itself." App. 28a. (emphasis added). Without any structure separate from NDS Group or the alleged racketeering acts themselves, the technology enterprise could not constitute an "enterprise" under RICO. *Id.*

The district court also ruled in favor of petitioners on the statutes of limitations issues, finding that all of respondents' non-RICO claims were time-barred. App. 8a-24a. The "basic statement of accrual law," the court observed, "is that 'a

claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action.'" App. 10a. The court concluded that the "claims under the DMCA and FC[A] accrued at least by the time that [Sogecable] noted the counterfeit MediaGuard smart cards began to emerge that 'contained a perfect replica of the complex encryption table.'" App. at 13a. "At this point, 1999, Plaintiffs knew, or reasonably should have known, that someone had distributed the MediaGuard UserROM (a/k/a SECAROM ZIP)." App. at 13a. The district court thus held that the three-year federal statute of limitations expired on December 31, 2002, six months before this July 2003 suit. App. at 20a-21a. The court also found that the statutory limitations period had run for the state law claims because "cards were being sold in Spain by at least July 2000 and the state interference torts only have two year statutes of limitations." App. 13a. The court declined to equitably toll the statutes of limitations, noting that Sogecable conceded it learned of NDS's alleged involvement in March 2002 when Canal+ filed its suit. App. 14a-15a.

3. The Ninth Circuit (Fletcher, B., Fernandez, and Graber, JJ.) reversed. App. 1a-5a.

The court ruled that plaintiffs' technology enterprise allegations properly state a RICO enterprise. NDS Group is the RICO "person." App. 4a. The court noted that the "enterprise consisted of two separate corporations" — NDS Group and its wholly-owned subsidiary, NDS Americas — as well as "the Haifa team," individuals "who appear to be independent contractors" "hired to hack the encryption code." App. 5a. The panel ruled that since NDS Group was not solely "both the RICO person and the RICO enterprise" "there is a distinct RICO enterprise pleaded." App. 5a. Although not expressly addressing the separate structure requirement applied by the district court, the court of appeals reversed the district court and held that plaintiffs adequately

pled a RICO enterprise. Thus, the court necessarily rejected the district court's holding that the allegations failed for lack of pleading a separate structure.

The court of appeals also reversed the district court's statutes of limitations ruling. The court did not take issue with the district court's holding that Sogecable knew or should have known of the injury in 1999. Nevertheless, the court held that Sogecable was entitled to bring suit three years from the time (March 2002) Sogecable discovered NDS's alleged involvement. App. 3a-4a. "Thus," the panel concluded, "when Plaintiffs filed suit in July 2003, all of their claims were timely." App. 4a.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL COURTS OF APPEALS ARE DEEPLY DIVIDED OVER WHETHER A RICO "ENTERPRISE" CAN CONSIST OF ONLY THE RICO PERSON AND ITS SUBSIDIARIES OR AGENTS

This Court has twice recognized the importance of resolving whether an "enterprise" can consist of only the RICO person and its subsidiaries or agents. In *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001), the Court held that "to establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner* involved an employee as the RICO person and his corporate employer as the enterprise. *Ibid.* The Court expressly distinguished the situation in which a "corporation was the 'person' and the corporation, together with all its employees and agents, were the 'enterprise.'" *Id.* at 164 (citing *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N. A.*, 30 F.3d 339, 344 (2d Cir. 1994)). Similarly, the Court also distinguished cases in which the RICO person and the "enterprise" are identical except that the enterprise includes

affiliated corporate entities. *Id.* (citing *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998)). The Court explicitly saved the question of whether this type of "oddly constructed entity" is an "enterprise" for a later day: "We do not here consider the merits of these cases, and note only their distinction from the instant case." *Id.*

More recently, this Court again confirmed the importance of resolving the question presented here. The Court granted certiorari on the question of whether "a defendant corporation and its agents can constitute an 'enterprise' under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ('RICO')." Pet. No. 05-465, filed from *Mohawk Industries, Inc. v. Williams*, 411 F.3d 1252 (11th Cir. 2005), *cert. granted*, *Williams v. Mohawk Indus., Inc.*, 546 U.S. 1075 (2005).[3] After argument, however, the Court dismissed the writ as improvidently granted. *Williams v. Mohawk Industries, Inc.*, 126 S. Ct. 2016 (2006); *see supra* at p. 3, n.1.

As *Cedric Kushner* suggested and the *Mohawk* grant confirmed, the circuit courts are in need of instruction from this Court on the requirement that a RICO enterprise be distinct from the RICO person. This case presents an opportunity for the Court to provide the necessary guidance.

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[3] Although the *Mohawk* question expressly mentions agents and not subsidiaries, courts do not distinguish between whether an enterprise can consist of a RICO person and its agents and whether an enterprise can consist of a RICO person and its subsidiaries. *See, e.g.*, *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (Posner, J.) (considering whether enterprise consists of the RICO person's "dealers and other agents (or any subset of the members of the corporate family)").

A. Three Circuits Hold That a RICO Person and its Subsidiaries or Agents Always Constitute an Enterprise

In the decision below, the Ninth Circuit applied its rule that a RICO person and its subsidiaries or agents always constitute a RICO enterprise. *See Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353 (9th Cir. 2005). The alleged RICO "person" in this case is NDS Group. App. 28a. The alleged enterprise includes only NDS Group, its subsidiary (NDS Americas), and its agents (the Haifa Team). App. 5a. The court noted that the "enterprise consisted of two separate corporations" – NDS Group and its wholly-owned subsidiary, NDS Americas – as well as "the Haifa team," individuals "who appear to be independent contractors." App. 5a. The panel ruled that because NDS Group is not solely "both the RICO person and the RICO enterprise," "there is a distinct RICO enterprise pleaded." App. 5a.

The decision below follows the rule adopted by the Ninth Circuit in *Living Designs*. In *Living Designs*, the plaintiffs alleged an enterprise consisting of the corporation "persons" and its agents, and, as here, the district court dismissed the complaint for failure to plead a distinct RICO enterprise. 431 F.3d at 361. Reversing, the court of appeals emphasized that a corporation is formally separate and distinct from its agents. *Id.* at 362. The court explained that a RICO person is always distinct from an enterprise unless "the enterprise cannot be either formally or practically separable from the person." *Id.* (citing *United States v. Benny*, 786 F.2d 1410, 1416 (9th Cir. 1986)).

The Eleventh Circuit also holds that a RICO person and its formally separate subsidiaries or agents always constitute an enterprise. That circuit addressed the question most recently in *Williams v. Mohawk Indus.*, 465 F.3d 1277 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 1381 (2007). In that case, agents (employment recruiters) of the RICO person allegedly

formed an enterprise with the RICO person. *Id.* at 1284. The Eleventh Circuit found that an enterprise could consist of the RICO person and its agents. *Id.* at 1284-85. In an earlier case, the court likewise found that a RICO person could consist of an enterprise formed out of the person and its corporate affiliates. *United States v. Goldin Indus., Inc.*, 219 F.3d 1271, 1276 (11th Cir. 2000).

Decisions from the Sixth Circuit also hold that any formal legal distinction between the RICO person and the enterprise suffices. In *Davis v. Mutual Life Ins. Co of NY*, 6 F.3d 367, 377 (6th Cir. 1993), for example, the court held that when the enterprise includes agents of the RICO person, the enterprise and RICO person are "distinct entities." *See also, e.g., Fleischhauer v. Feltner*, 879 F.2d 1290, 1297 (6th Cir. 1989) (allegations of "separate legal entities" suffice to show enterprise separate from RICO person, even when they have a common owner).[4]

B. Four Circuits Hold That a RICO Person and its Subsidiaries or Agents "Sometimes" Constitute an Enterprise

Although not adopting the formalistic rule of the Sixth, Ninth, and Eleventh Circuits, four circuits have held that an enterprise can sometimes include just the RICO person and its agents or subsidiaries. These courts have struggled, however, to establish a clear rule of law.

For example, the First Circuit has held that "in most cases" a RICO person and its subsidiary or agent cannot constitute an enterprise. *Bessette v. Avco Fin. Servs.*, 230 F.3d 439, 449 (1st Cir. 2000), explained: "In most cases, a sub-

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[4] One panel of the Sixth Circuit has suggested, in dicta, that "a corporation may not be liable under section 1962(c) for participating in the affairs of an enterprise that consists only of its own subdivisions, agents, or members." *Begala v. PNC Bank, Ohio*, 214 F.3d 776, 781 (6th Cir. 2000).

sidiary that is under the complete control of the parent company is nothing more than a division of the one entity," so "[w]ithout further allegations [of distinct activities], the mere identification of a subsidiary and a parent in a RICO claim fails the distinctiveness requirement." *Id.*; *see also Compagnie De Reassurance D'ile De France v. New England Reinsurance Corp.*, 57 F.3d 56, 92 (1st Cir. 1995) (RICO person could not associate with the alleged enterprise because it included only a subsidiary of the RICO person with no allegation that the subsidiary took action independent of its parent).

Likewise, the Second Circuit holds that a RICO enterprise may sometimes consist of the RICO person and its subsidiaries or agents. For example, in *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), *reversed on other grounds*, 525 U.S. 128 (1998), cited by the Court in *Cedric Kushner*, the Second Circuit held that adding subsidiaries to a RICO person does not necessarily constitute a RICO enterprise. 93 F.3d at 1063. According to the court, if both the alleged RICO person and the alleged RICO enterprise "were acting within the scope of a single corporate structure, guided by a single corporate consciousness," the allegations did not state a RICO enterprise. *Id.* at 1063. The court allowed that the "situation might be different if" the RICO person was not acting within the scope of the enterprise's single corporate consciousness. *Ibid. Accord Riverwoods Chappaqua Corp. v. Marine Midland Bank*, 30 F.3d 339, 344 (2d Cir. 1994) (RICO enterprise cannot consist of a RICO person and its own agents if the agents are "carrying on the regular affairs of the defendant").

Like the First and Second Circuits, the Eighth Circuit sometimes permits an enterprise to consist of the RICO person and its subsidiaries or agents. In *Fogie v. THORN Americas*, 190 F.3d 889 (8th Cir. 1999), the court asked whether "a subsidiary may be sufficiently distinct from its

parent or other related subsidiaries so as to satisfy § 1962(c)'s distinctiveness requirement." The court held that it was "not enough" that the parent and subsidiary were "separate legal entities" or had "different roles" in the enterprise. *Id.* at 898. But the court did not hold that a RICO enterprise could never consist solely of the RICO person and its subsidiaries or agents, instead suggesting that such an enterprise could exist if a plaintiff were to make an unspecified "greater showing" of "distinctiveness." *Id.*

The Tenth Circuit also sometimes permits an enterprise to consist of the RICO person and its subsidiaries or agents. In dismissing a RICO claim alleging that the parent of the corporate defendant was the enterprise, the court held that "a plaintiff must, at the very least, allege [that] the parent somehow made it easier to commit or conceal the fraud of which the plaintiff complains." *Brannon v. Boatmen's First Nat'l Bank*, 153 F.3d 1144, 1147 (10th Cir. 1998) (internal quotation marks and citation omitted); *see also Board of County Comm'rs v. Liberty Group*, 965 F.2d 879, 885-86 (10th Cir. 1992) (when RICO person was only "going about its ordinary business" through the alleged enterprise of its employees and agents, enterprise was not distinct).

Although these circuits reject the strict rule that formal separateness between the RICO person and enterprise is not sufficient, the courts have suggested differing formulations of when a RICO enterprise can consist of a RICO person and its subsidiaries or agents. The First Circuit, for example, requires "further allegations" of "independent action" while the Tenth Circuit insists on allegations that "the parent somehow made it easier to commit or conceal the fraud." The Second Circuit looks for variations in "corporate consciousness" while the Eighth Circuit vaguely insists on a "greater showing of distinctness."

C. Four Circuits Correctly Hold That a RICO Person and its Subsidiaries or Agents Never Constitute an Enterprise

In direct conflict with the Sixth, Ninth, and Eleventh Circuits, and in considerable tension with the qualifying statements of the First, Second, Eighth, and Tenth Circuits, four circuits apply a straightforward rule that a RICO enterprise can never consist solely of the RICO person and its subsidiaries or agents. Section 1962(c) makes it unlawful for a RICO "person" to "associate" with an "enterprise" engaged in a pattern of racketeering activity. Consistent with the statutory text, the Third, Fourth, Fifth, and Seventh Circuits hold that the RICO enterprise can never include only the RICO person and its subsidiaries or agents. These courts adopt the sensible view that a RICO "person" cannot "associate" with itself and thus a RICO "enterprise" cannot consist of mere extensions of the RICO person, such as subsidiaries or agents.

The Third Circuit, for example, applies a bright-line rule that a RICO enterprise cannot consist of the RICO person and its subsidiaries or agents. A corporation "cannot be a defendant under section 1962(c) for conducting an 'enterprise' consisting of its own subsidiaries or employees, or consisting of the corporation itself in association with its subsidiaries or employees." *Gasoline Sales v. Aero Oil Co.*, 39 F.3d 70 (3d Cir. 1994), *disapproved on other grounds by Jaguar Cars v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995). The court explained that it has "interpreted corporate identity expansively, so that the actions of a corporation's agents conducting its normal affairs are constructively its own actions for section 1962(c) purposes." *Id.* at 73. Thus, the RICO person "cannot be sued" "for conducting its subsidiaries" in a pattern of racketeering activity because an

enterprise cannot consist merely of the RICO person and "itself." *Ibid.*[5]

The leading Fourth Circuit case is *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). There, in ruling that the division of a corporation could not associate with the corporation "person,' the court explained that "'enterprise' was meant to refer to a being different from, *not the same as or part of*, the person whose behavior [RICO] was designed to prohibit. . .." *Id.* at 1190 (emphasis added). *See also NCNB Nat'l Bank v. Tiller*, 814 F.2d 931, 936 (4th Cir. 1987))("[A] 'person' is not distinct from an 'enterprise' when a corporation and its wholly owned subsidiary are involved.").

The Fifth Circuit also does not permit a RICO enterprise to include solely the RICO person and its subsidiaries or agents. In *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143 (5th Cir. 1997), *vacated on other grounds*, *Teel v. Khurana*, 525 U.S. 979 (1998), the court observed that by plaintiffs pleading combinations of subsidiaries and parents as the person and enterprise, they were attempting to avoid the RICO distinctness requirement. The court held that "[w]hen the alleged association-in-fact is in reality no different from the association of individuals or entities that constitute a defendant 'person' and carry out its activities, the distinctiveness requirement is not met in regard to that defendant." 130 F.3d at 155; *accord Whelan v. Winchester Prod. Co.*, 319 F.3d 225, 229 (5th Cir. 2003) (no RICO enterprise when "a defendant corporation through its agents committed the predicate acts in the conduct of its own business").

In a series of decisions, the Seventh Circuit also has repeatedly held that a RICO enterprise cannot consist solely of

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[5] The Third Circuit has "hypothesized that a 'narrow,' 'theoretical,' and 'rare' exception" to its bright-line rule "might exist." *Id.* at 73. The Third Circuit, however, has yet to find a case that fits this hypothetical exception.

a RICO person and its subsidiaries or agents. For example, in *Bachman v. Bear, Stearns & Co.*, 178 F.3d 930, 932 (7th Cir. 1999) (Posner, J.), the court stated: "A firm and its employees, or a parent and its subsidiaries, are not an enterprise separate from the firm itself." Similarly, in *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997), the Seventh Circuit held that a RICO enterprise cannot "associate" with a RICO person when the enterprise consists of the RICO person's "dealers and other agents (or any subset of the members of the corporate family)." *Accord Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004), *cert. denied*, 543 U.S. 956 (2004) (allegations that the RICO person and its agents are the enterprise "won't fly").

* * *

In granting the petition in *Mohawk*, this Court recognized the need to give the lower courts guidance on whether, and if so, when, an "enterprise" can include solely the RICO person and its subsidiaries or agents. The split remains deep and intolerable: three circuits hold that such allegations always state a RICO enterprise, four circuits have attempted to carve out a "sometimes" position, and four circuits properly hold that an enterprise cannot consist of the RICO person and its subsidiaries or agents. Certiorari should be granted.

II. THE FEDERAL COURTS OF APPEALS ARE DIVIDED 5 TO 4 ON WHETHER "ENTERPRISE" INCLUDES A STRUCTURE REQUIREMENT

This case also presents a second, related, question concerning the meaning of "enterprise" in the RICO statute. RICO defines an "enterprise" to include any "group of individuals associated in fact" and makes it unlawful for any person associated with that enterprise to engage "in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. §§ 1961(4), 1962(c). The courts of appeals do not agree whether the "pattern of racketeering activity" is sufficient by itself to establish a RICO enterprise

or whether a RICO enterprise must also have an ascertainable structure apart from those illegal acts.

The judicial confusion centers on this Court's decision in *United States v. Turkette*, 452 U.S. 576 (1981). In *Turkette*, the Court distinguished the "pattern of racketeering activity" from the "enterprise" engaging in that activity: "The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute." 452 U.S. at 583. "The existence of an enterprise at all times remains a separate element which must be proved by the Government." *Id.*

"The Court's explanation of the meaning of an associated-in-fact enterprise in *Turkette* has not been clearly understood in the lower courts." *Odom v. Microsoft Corp.*, No. 04-35468, 2007 WL 1297249, at *8 (9th Cir. May 4, 2007) (noting deep circuit split on the question). On the one hand, the Third, Fourth, Seventh, Eighth, and Tenth Circuits interpret *Turkette* to require that a RICO plaintiff allege that the enterprise has a "structure" that is separate from that necessary to accomplish the alleged pattern of racketeering activity. On the other hand, the First, Sixth, Ninth, and Eleventh Circuits have expressly rejected a separate structure requirement.

A. Five Circuits Hold That A RICO Enterprise Must Have A Structure Apart From The Pattern Of Racketeering Activity

Following this Court's decision in *Turkette*, the Eighth Circuit reiterated its long-standing rule that a RICO enterprise must have a structure that is different from the pattern of racketeering activity. In *United States v. Bledsoe*, 674 F.2d 647, 663 (8th Cir. 1982), the court explained that "[c]onstruing the [RICO] statute to give effect to all its words, it requires an association with an enterprise which is

distinct from participation in the conduct of the enterprise through a pattern of racketeering activity." Indeed, "unless the inclusion of the enterprise element requires proof of some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering, the Act simply punishes the commission of two of the specified crimes within a 10 year period." *Id.* at 664. The Eighth Circuit found that Congress intended the Act to apply to structured enterprises engaging in criminal conduct. *Accord United States v. Anderson*, 626 F.2d 1358, 1362 n.4 (8th Cir. 1980); *Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir. 2003) ("enterprise must have . . . an ascertainable structure distinct from the pattern of racketeering").

The Third Circuit also requires a RICO plaintiff to allege a structure that is separate from the alleged RICO activity. *United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir. 1983). In *Riccobene*, the Third Circuit explained that an "enterprise" must have "an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses." *Id.* at 224. Thus, "the government must show that some sort of structure exists within the group for the making of decisions." *Id.* at 222; *accord United States v. Console*, 13 F.3d 641, 651-52 (3d Cir. 1993) (finding the evidence at trial satisfied the "separate structure" requirement when the enterprise "coordinated the commission of multiple predicate offenses," while it "continued to provide legitimate services during the period").

In agreement with *Bledsoe* and *Riccobene*, the Fourth, Seventh, and Tenth Circuits also require the structure of a RICO enterprise to exist separately from its predicate illegal acts. In *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985), the Fourth Circuit held that proof of an "enterprise" requires a showing "that the organization had an existence beyond that which was necessary to commit the predicate

crimes" (citing *Riccobene*, 709 F.2d at 223-24; *Bledsoe*, 674 F.2d at 655). The Seventh Circuit adopted the same position in *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 645 (7th Cir. 1995), explaining that a RICO complaint alleging an enterprise must identify "a structure and goals separate from the predicate acts themselves." *Id.*[6] Similarly, the Tenth Circuit has adopted the majority position of *Bledsoe* and *Riccobene* and concluded that an "enterprise" must have "an ascertainable structure that exist[s] apart from the commission of racketeering acts." *United States v. Sanders*, 928 F.2d 940, 943 (10th Cir. 1991) (noting that "courts have differed in their views of how separate and distinct the existence of the enterprise must be from the underlying pattern of racketeering"); *accord United States v. Smith*, 413 F.3d 1253, 1267 (10th Cir. 2005) ("In other words, the 'enterprise' must not be just the name for the crimes KMD members committed.").

The Third, Fourth, Seventh, Eighth, and Tenth Circuits thus all agree that a RICO claim must include an allegation that the enterprise has a structure that exists apart from the pattern of racketeering activity.

B. Four Circuits Hold That There Is No Structure Requirement

Four circuits have expressly rejected the *Bledsoe-Riccobene* separate structure requirement. In these circuits, proof of an "enterprise" need not be separate from proof of the predicate RICO acts. Within these circuits, the term "enterprise" becomes effectively meaningless because any conspiracy for the commission of the predicate crimes falls

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[6] The Seventh Circuit has again noted that "because a RICO enterprise is more than a group of people who get together to commit a 'pattern of racketeering activity,' there must be an organization with a structure and goals separate from the predicate acts themselves." *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 675 (7th Cir. 2000).

within the purview of the RICO statute. *See Bledsoe*, 674 F.2d at 664.

The First Circuit has directly rejected the separate structure requirement. In *United States v. Patrick*, 248 F.3d 11, 18 (1st Cir. 2001), the court acknowledged and rejected the Eighth Circuit's *Bledsoe* analysis: "We today explicitly reject the *Bledsoe* test as an additional requirement beyond the *Turkette* instruction." The court declined to "import an 'ascertainable structure' requirement." *Id.* at 19.

The Sixth Circuit has also "specifically rejected" the *Bledsoe* test. *United States v. Collins*, No. 87-1283, 1991 U.S. App. LEXIS 3575, at *41 (6th Cir. Feb. 26, 1991). In *United States v. Qaoud*, 777 F.2d 1105, 1115 (6th Cir. 1985), the court held that an "enterprise" and a "pattern of racketeering activity" could be proved by the same evidence. The Sixth Circuit has since, in multiple unpublished opinions, interpreted the holding in *Qaoud* as a rejection of the separate "ascertainable structure" requirement recognized by *Bledsoe* and the majority of the other circuits. *See, e.g.*, *McNeil v. Salan*, No. 91-2041, 1992 U.S. App. LEXIS 11476, at *10 (6th Cir. May 14, 1992); *Collins*, 1991 U.S. App. LEXIS 3575, at *41.

The Eleventh Circuit addressed the question soon after this Court's decision in *Turkette*. In *United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir. 1983), the Eleventh Circuit sustained its pre-*Turkette* decisions holding that a RICO claim need not allege an enterprise with a structure that is "separable from the pattern of racketeering activity." *Id.* (citing *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978) (binding on the Eleventh Circuit)). The court noted the Eighth Circuit's holding that an enterprise possess an "'ascertainable structure' distinct from the association necessary to conduct a pattern of racketeering activity" and "expressly acknowledged" that its position was contrary to *Bledsoe*. *Id.*

Joining the First, Sixth, and Eleventh, the en banc Ninth Circuit recently overruled its precedent and rejected the separate structure requirement. At the time the district court below ruled, the Ninth Circuit required proof of a separate structure. In *Chang v. Chen,* 80 F.3d 1293, 1299 (9th Cir. 1996), the court held that, in order to sustain a RICO claim, it is necessary "to show that the organization has an existence beyond that which is merely necessary to commit the predicate acts of racketeering." Under that holding, a claimant needed to show that the organized entity existed to commit "several different predicate offenses and *other activities* on an on-going basis." *Id.* (citing *Riccobene*, 709 F.2d at 224.) The court confirmed its position in *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1083-84 (9th Cir. 2000), declaring that "a group does not constitute an enterprise unless it exists independently from the racketeering activity in which it engages." *Id.*

Recently, however, the Ninth Circuit, en banc, wrote: "We take this opportunity to join the circuits that hold that an associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise." *Odom v. Microsoft Corp.*, No. 04-35468, 2007 WL 1297249, at *9 (9th Cir. May 4, 2007). In so holding, the court expressly overruled both *Simon* and *Chang*, the cases relied on by petitioners and the district court. *Id.* ("To the extent that our past precedent suggests the contrary, it is hereby overruled. *See, e.g., Wagh v. Metris Direct, Inc.*, 348 F.3d 1102, 1112 (9th Cir. 2003); *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1083-84 (9th Cir. 2000); *Chang*, 80 F.3d at 1298-99, 1301.").

Reflecting the judicial uncertainty over the question presented, five judges disagreed with the en banc court's interpretation of the RICO enterprise requirement. Noting that the "language in *Turkette* is the starting point," the five Ninth Circuit judges argued that RICO requires "some minimal

structure, coordination, or ordering principle to distinguish them from a run-of-the-mill conspiracy." *Id.* at *14 (Silverman, J., concurring on unrelated grounds).

This Court's guidance is plainly necessary to resolve the entrenched and widespread disagreement among the circuits about the requirements to allege a RICO "enterprise."

III. THE NINTH CIRCUIT'S ADOPTION OF AN IDENTITY DISCOVERY RULE SHOULD BE SUMMARILY REVERSED BECAUSE IT DIRECTLY CONFLICTS WITH *UNITED STATES V. KUBRICK*

Separate and apart from its rulings on the RICO issues, the court of appeals also held that the statutory limitations period for purposes of DMCA, FCA, and state common law claims begins only when the identity of the alleged injuror is discovered. That "identity-discovery" rule is contrary to *United States v. Kubrick*, 444 U.S. 111 (1979), and other precedents of this Court. Those precedents hold that the limitations period is triggered at the earliest when the plaintiff discovers its injury, not when it discovers the identity of the defendant.

The "standard rule" for calculating a limitations period is that the period commences when the plaintiff has a complete cause of action. *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997); *Clark v. Iowa City*, 87 U.S. 583, 589 (1875) ("all statutes of limitation begin to run when the right of action is complete"); *TRW Inc. v. Andrews*, 534 U.S. 19, 39 (2001) (Scalia, J., concurring) ("a statute of limitations begins to run when the cause of action is complete"). Limitations statutes reflect a legislative judgment that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944). *See, e.g., Rotella v. Wood*, 528 U.S. 549, 559 (2000) ("A limitations period that would have begun to run

only eight years after a claim became ripe would bar repose, prove a godsend to stale claims, and doom any hope of certainty in identifying potential liability."). A limitations defense, therefore, is a "meritorious defense, in itself serving the public interest." *Guar. Trust Co. v. United States*, 304 U.S. 126, 136 (1938).

In a few specific instances, the Court has recognized that a plaintiff who does not immediately "discover" the "injury" is entitled to additional time to file suit. In cases of fraud (*Holmberg v. Armbrecht*, 327 U.S. 392 (1946)) and latent disease (*Urie v. Thompson*, 337 U.S. 163 (1949)), the Supreme Court has approved a discovery rule that starts the limitations period only when the plaintiff learns (or should have learned) of the fraud or disease. Even in those limited instances where the Court has adopted a "discovery" rule, however, the Court has not postponed the start of the limitations period to the time when plaintiff discovers the source of the injury or the identity of the injurer.

In *Kubrick*, this Court squarely rejected the argument that the narrow exception of the discovery rule should be extended to apply when the injured person knows of the injury but not its source. There, plaintiff was treated for a leg infection with an antibiotic and soon thereafter suffered loss of hearing. 444 U.S. at 118. A few years later, plaintiff learned that the antibiotic may have caused his hearing loss. *Ibid.* The Court held that the statute of limitations began to run when the plaintiff learned of the hearing loss. *Ibid.* In so holding, the Court rejected the court of appeals' ruling that the statute of limitations did not begin running "until [plaintiff] knows or should suspect that the [defendant] who caused his injury was legally blameworthy." *Id.* at 119. The Court was "unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment." *Id.* at 122. Unlike a plaintiff who does

not know of his injury, a plaintiff who is aware of his injury but merely not aware of his "legal rights" has ample "prospect[s]" for timely bringing suit. *Ibid.* The plaintiff could have, for example, sought the advice of a "competent doctor" once he suffered the loss of hearing. *Ibid.* Thus, there was no sound reason to extend the time to file suit based on his lack of knowledge that the antibiotics caused the injury.

The facts of this case are on all fours with *Kubrick*, but the court below reached the opposite result. As in *Kubrick*, the plaintiffs here were well aware of the "fact of injury" — the publication of the UserROM and distribution of counterfeit cards — and the court of appeals, like the lower court in *Kubrick*, granted the plaintiffs additional time to sue because they claim not to have been aware that NDS was "legally blameworthy" for the injury. But, as in *Kubrick*, the plaintiff here unquestionably had ample "prospects" for timely bringing suit. As the district court emphasized, Sogecable could have brought timely suit, as Canal+ in fact did. App. 14a. Just as the Court held that the *Kubrick* malpractice plaintiff's time for bringing suit started once the loss of hearing was discovered, so too the Ninth Circuit should have held that Sogecable's time to sue started when the UserROM was published and the counterfeit cards were distributed. The court of appeal's contrary ruling directly conflicts with *Kubrick*.

Summary reversal is appropriate.

* * *

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENIE C. GAVENCHAK
Deputy General Counsel
News America Inc.
1211 Avenue of the Americas
New York, New York 10036

DARIN W. SNYDER
(Counsel of Record)
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California
90071
(213) 430-6000

MARK S. DAVIES
DAVID J. L. MORTLOCK
SUSAN M. MOSS
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006

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